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Supreme Court, U.S.
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No. 03-1318

In The

Supreme Court of the United States

Jack R. Whitehorn,

Petitioner,

versus

Federal Communications Commission,
an Agency of the United States Government, and
DOES I through XX inclusive;
and ROES I through X inclusive,

Respondents.

On Petition for a *Writ of Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

Jack R. Whitehorn
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INTRODUCTION

The petitioner herein, Jack R. Whitehorn, respectfully petitions this Court for a Rehearing of the Letter/Order entered May 3, 2004 in the referenced case herein, ordering the Petition for *Writ of Certiorari* denied. The said Order was signed by the Clerk of the Court.

SUBSTANTIAL OR CONTROLLING EFFECTS OR TO OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED FOR REHEARING OF PETITION FOR *WRIT* OF *CERTIORARI*

We have never cited a Supreme Court Rule concerning the *writ* of *certiorari*. We now invoke Supreme Court Rule 10(c) wherein "an important question of federal law that has not been, but should be, settled by this Court."

One of the key question that has been presented to the Court is as follows: "Is the legal memorandum judgment rendered by the Court of Appeals with error regarding the transfer of two radio licenses time-barred because the cause of action accrued more than two years before filing the instant action pursuant to 28 U.S.C. § 2401(b)?" The **determination of when a claim accrues for the purpose of beginning the running of a statute of limitations is a question of federal law**; see 2nd Circuit -- *Toal v. United States* (1971, CA2 Comm) 438 F2d 222; 3rd Circuit – *Tyminski v. United States* (1973, CA3 NJ) 481 F2d 257; 4th Circuit – *Portis v. United States* (1973 CA4 Va) 483 F2d 670; 5th Circuit – *Williams v. United States* (1968 CA5 Ga) 405 F2d 234, 12 FR Serv 2d 228, 12 ALR Fed 224; 6th Circuit –*Jordan v. United States* (1974 CA6 Mich) 503 F2d 620 (disapproved on other grounds *United States v. Kubrick*, 444 US 111, 62 Ed 2d 259, 100 S Ct 352); 7th Circuit – *Stoleson v. United States* (1980, CA7 Wis) 629 F2d 1265 , later app (CA7 Wis) 708 F2d 1217; 8th Circuit – *Reilly v. United States* (1975 CA8 Neb) 513 F2d 147, 29 ALR Fed 476; 9th Circuit – *Hungerford v. United States* (1962, CA9 Cal) 307 F2d 99 (ovrid on other grounds *Ramirez v. United States* (CA9 Cal 567 F2d 854).

We have not heretofore included for this Court, the letter from the Federal Communications Commission dated August 14, 1981 wherein at Appendix page 5a, paragraph 2, the letter clearly states:

> "Concerning your claims of ownership over WFDR, Inc., we note that the Bankruptcy Court expressly rejected your arguments in ordering that the property of WFDR, Inc. be sold to Provident. Furthermore, you have not obtained an injunction from a court with authority to enjoin the sale of the stations. Under such circumstances, the Commission will not defer action on assignment or transfer applications pending final resolution of disputed claims. **The Commission has neither the jurisdiction nor the machinery to adjudicate claims of the nature alleged by you. Such claims must be settled privately or in a court of competent jurisdiction using local law.**" (Emphasis added.)

Unequivocal evidence clearly shows that the agency was notified within two years of the claim accrual, 28 U.S.C. §§2401(b), 2675(a); *Nancy McGraw et al. v. United States of America*, 281 F3d 997 (9th Cir. 2002). The lower court from which we seek petition for *writ* of *certiorari* has decided entirely differently from the case herein as well as other Courts of Appeal as set out in the original petition. The lower court has rendered an incorrect application of the statute and/or Supreme Court precedent as well as said other Courts of Appeals and the Ninth Circuit Court of Appeals' findings in other cases. This incorrect application of the statute is of general importance beyond the effect on this litigant. There can be no question pursuant to the above-cited case by the Ninth Circuit and the above-cited evidence from the federal agency that the lower court's decision pursuant to limitations is with total error and a *writ* of *certiorari* should be granted pursuant to the documented evidence as provided herein.

This Honorable Court, in a landmark decision case, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 120 L. Ed 2d

798, 60 U.S.L.W. 4842 (1992), decided the dramatic effect on the economic value by a "taking of private property" under the Fifth and Fourteenth Amendments required the payment of "just compensation." U.S. Constitution, Amendment. 5.

In the instant case, the **"taking of the private right" was valid radio station licenses** and the said licenses were issued and **valid April 9, 1979 to April 1, 1982**. This Honorable Court has recognized at various points in its opinion the existence of a private right or interest in a station license while the license is outstanding. See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 1940, 309 U.S. 134, 60 S. Ct. 437, 84 L. Ed 656. Further this Court has held that while a station license does not under the act confer an unlimited or indefeasible property right (*Federal Communications Commission v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, 60 S. CT. 693 84 L. Ed. 864) – the right is limited in time quality by the terms of the license and is subject to suspension, modification or revocation in the public interest – nevertheless the right under a license for a definite term to conduct a broadcasting business requiring – as it does – substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the persons to whom it is issued and a business conducted under it may be the subject of injury. We set forth in the margin, quotations from decisions of the Supreme Court which supports these statements and also provisions of the Communications Act itself which recognize that a broadcast license confers a private right, although a limited and defeasible one. See *L. B. Wilson Inc. v. FCC*, U.S. App. D.C. 176, 170 F2d 793.

DISCUSSION BY PETITIONER JACK R. WHITEHORN WITH REASONING FOR GRANT OF *WRIT* OF *CERTIORARI*

This *pro se* litigant believed the federal agency (FCC) when by telephone, **Mr. Taft Snowdon**, of the said agency, **assured petitioner** that after the ownership question was resolved, **if** the **petitioner herein was adjudicated the owner** by a court of competent jurisdiction, the **said action** by the FCC's **"taking of the licenses, the property right"** on or about August 14, 1981, would

be reversed and **"the licenses, the property right" returned** to Jack R. Whitehorn, the adjudicated owner of said "property right."

The agency with utter and complete disregard of the injury to Whitehorn, pulled up the rescue letter it had previously lowered to Whitehorn by denying Whitehorn's petition for revocation of license.

This Court, in its landmark case, *Lucas v. South Carolina Coastal Council*, *supra*, said that it was required to decide whether the acts on *Lucas* were a dramatic effect on the economic value of Lucas' property and accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring a payment of "just compensation."

The lifework of this petitioner, Jack R. Whitehorn, the ownership of the licenses, was the economic value taken by the federal agency without compensation and without due process of law, the licenses "taken," by a letter from the agency, postage-paid by the taxpayers of the United States of America. (Said letter at Appendix hereto and incorporated herein by reference.) (No hearing convened.) This Court recited in the Lucas case: "the cases say, repeatedly and unmistakably that "the test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land." "*Keystone*, 480 U.S., at 495 (quoting *Hodel*, 452 UL.SL, at 295-296 (quoting *Agins*, 447 U.S., 260).

This petitioner's question: **Is land** (*i.e.*, real property) the **only property** that is **protected by** the **Fifth Amendment** that provides no person shall be deprived of life, liberty, or property without due process of law? If this is the case, then the Court should say only real property applies to their finding in this case. We don't believe the Court distinguishes between "value," *i.e.*, real property or personal property.

We believe the federal agency (FCC) had a duty to deal honestly, openly, and fairly with the public, without caprice, to

honor its specific commitments by virtue of the determined purpose of Congress in the enactment of legislation giving birth to the Federal Communications Act as well as following the precedent law as was set forth in this petitioner's complaint filed with the Federal Communications Commission, subsequently denied, and then timely filed in the United States District Court, District of Nevada, as attached to the original Petition for *Writ* of *Certiorari* by this petitioner.

This petitioner is not privy as to how this Honorable Court determines a grant of *certiorari*. I am sure there are hundreds upon hundreds of petitions filed at this High Court on a yearly basis. It would be almost impossible for the Justices to review all of these cases. However, for **whomever reviews this final petition, please be aware that this petitioner was promised his property back by the federal agency (FCC) after litigating the ownership matter to a successful resolution**. After long, hard, and very expensive litigation, the **results were the ownership rights of the FCC licenses belonged to Jack R. Whitehorn** pursuant to a settlement agreed upon by all parties and an Order issued by the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, the Honorable Judge Homer Drake entering said order.

The **said agency reneged and has taken this petitioner's property.** The federal agency (FCC) has committed an unlawful violation of a private legal right, violated the public duty, and acting with authority did take the petitioner's property as set forth in the complaint as shown in the original petition for *writ* of *certiorari* in this instant matter.

We believe that the perception of the decision and taking of the "property right" is wrong in the light of the Supreme Court case (*i.e., Lucas v. South Carolina Coastal Council*). We further believe that under whatever process this petition may go through to reach the Justices' desks should be done in the light, if nothing else, the Constitutional protection of this petitioner's "property rights," the same as Mr. Lucas' protection of real property rights.

There are unsettled questions of Federal Constitutional protection involved here as well as errors of statutory law rendered by the court below. In this matter as in this Court's precedent cases involving broadcast licenses issued by the federal agency (FCC) and becoming a thing of value as determined by this Court in precedent cases, the property right and the value must be protected under the Taking Clause pursuant to precedent cases including but not limited to *Lucas*, *supra*,

Surely the **reviewing panel can readily see** there is **conflict with rulings of other courts** and the importance thereof and the detection that the decision below is wrong in accordance with this Honorable Court's precedent.

WILL DENIAL OF *CERTIORARI* IN THIS MATTER INVALIDATE PRECEDENT SUPREME COURT RULINGS

This is a Federal Tort Claims Act (FTCA) action for injury to or loss of property. All of the requirements preceding the filing of this action in the District Court were meticulously met. The **only issue the Appeals Court addressed was the limitations matter**. The court erred concerning the said two-year limitations period as we have unequivocally shown herein and in the original petition on file with the Court.

The petitioner herein was entitled to and did receive a written notice of denial from the said agency. The cause of action was filed in the District Court timely.

This petitioner, not being learned counsel, has spent considerable time, money, and untiring efforts proceeding as instructed by the agency, following the rules, and directives of filing an action pursuant to the Federal Tort Claims Act as well as Rules of Civil Procedure, Rules of Appellate Procedure and Rules of this Honorable Court -- at all times believing and still **believing** that **"justice" will be fulfilled**. With this in mind, a question has arisen, and we believe this Court may wish to address.

The question is simply: If this *Writ* of *Certiorari* is denied, is all of the case law this Court has previously determined and issued regarding the matter of broadcast licenses, the value of the license, the "taking" of a broadcast license without compensation, an action of a lower court that is in conflict with other courts including but not limited to tolling as thoroughly addressed in our opening brief – would all of these precedent cases be overruled and become invalid with the denial of this *writ*? This question is presented in good faith without any inference of condescension.

CONCLUSION

We are a *pro se* petitioner -- perhaps a learned counselor of law would be recognized in a better light before this Court -- we do what we must do and have faith in the system. Accordingly, we **pray this Honorable Court** to **review** this **Petition for Rehearing**; associate same with our Petition for *Writ* of *Certiorari* on file with this Honorable Court; and after considering all the factors involved that a ***Writ* of *Certiorari* be issued** to Petitioner Jack R. Whitehorn.

Respectfully submitted this 26th day of May 2004.

Jack R. Whitehorn, Appearing *Pro Se*

CERTIFICATION OF
***PRO SE* LITIGANT**

This to certify that the foregoing Petition for Rehearing is presented in good faith and not for delay. It is further certified that to petitioner's best knowledge, information, and belief, that the petition complies with this Honorable Court's Rule 44 concerning the rehearing.

Jack R. Whitehorn, Appearing *Pro Se*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON. D.C. 20554

AUG 1 4 1981

IN REPLY REFER TO.
8430

Mr. Jack Whitehorn
2707 Colanthe Avenue
Las Vegas, Nevada 89102

Dear Mr. Whitehorn:

This is in reference to your letter dated May 27, 1981, your "Motion to Dismiss" filed with the Commission on July 30, 1981, and your 'Supplementary Response" received on August 12, 1981, all of which request denial or deferral of action on the application for transfer of 100% control of WFDR, Inc., licensee of WFDR and WFDR-FM, Manchester, Georgia, from WPDR, Inc., Debtor-in-Possession, to Provident Broadcasting Company (BTC-810428HV and BTCH-810428HW).

On June 19, 1980, the Commission gave effect to an order of the United States Bankruptcy Court, Northern District of Georgia, Newman Division, by granting an application requesting the approval of the assignment of the licenses for stations WFDR and WFDR-FM from WPDR, Inc., to WFDR, Inc., Debtor-in-Possession. On June 29, 1981, that same court entered an Order Confirming Plan wherein it approved the transaction proposed in the present application which would result in Provident Broadcasting Company being the 100% stockholder of WFDR, Inc.

Section 309 of the Communications Act of 1934, as mended, and Section 73.3584 of the Commission's rules, provide that petitions to deny must be filed within thirty days from the date an application is accepted for filing, must be served on the applicant, must contain specific allegations of fact sufficient to show that grant of the application would not serve the public interest and be supported by affidavit of a person with personal knowledge of the facts alleged. Your submissions are procedurally defective as a petition to deny. Nevertheless, they have been considered

as informal objections under Section 73.3587 of the Commission's rules.

You contend that WFDR, Inc., Debtor-in-Possession, "does not have legal title to the stations and that any transfer to Provident would be an unauthorized transfer of control." In this regard, you state that you have appealed the Bankruptcy Court's decision and that the appeal is currently pending. You request that the Commission "stay the transfer proceedings . . . until such time as all issues of ownership are resolved."

In your "Supplementary Response," you further allege that Provident has assumed control of the stations prematurely. You have submitted a letter from Jimmy D. NeSmith, President of First American Bank, wherein he states that a "Mr. Garstin, who claims to be manager and an officer of WFDR, Inc., came to my office with another gentleman and identified him as the new owner of WFDR," and that these individuals tried to sell him advertising. Robert M. Garstin and James M. Goodloe, the "other gentleman," have both responded to Mr. NeSmith's statements. They maintain, in affidavits, that at that time they were both associated with WPDR, Inc., Debtor-in-Possession, that Mr. Goodloe was not held out to be the new owner of the stations, and that they were offering to sell advertising in the name of WFDR, Inc., Debtor-in-Possession, and not Provident. Neither Mr. Garstin nor Mr. Goodloe are officers, directors or stockholders of the proposed assignee. Mr. Garstin was to be the general manager of the stations but has now accepted another position elsewhere.

The Commission has stated that "at the very least, complaints to the Commission, regardless of label, should contain specific factual allegations which would warrant grant of the relief requested." Hanes Broadcasters, Inc., *52 FCC* 2d 998, 1002 (1975), quoting from Midland Broadcasters, Inc., 48 FCC 2d 195, 196 (1974). In order to justify deferral of an application or its designation for hearing, an objection must present "a substantial and material question of fact" as to whether a grant of the application would serve the public interest, convenience and

necessity. 47 US.C. §309(e). Your allegations based on Mr. NeSmith's perception of his meeting with Messrs. Garstin and Goodloe have been adequately refuted by affidavits and his contentions fail to indicate that the proposed assignee has assumed control of the stations prior to Commission authorization . The matters alleged do not present a prima facie case of premature assumption of control over the operations of the stations by the assignee, and do not present substantial and material questions of fact which would warrant further inquiry.

Concerning your claims of ownership over WFDR, Inc., we note that the Bankruptcy Court expressly rejected your arguments in ordering that the property of WFDR, Inc. be sold to Provident. Furthermore, you have not obtained an injunction from a court with authority to enjoin the sale of the stations. Under such circumstances, the Commission will not defer action on assignment or transfer applications pending final resolution of disputed claims. The Commission has neither the jurisdiction nor the machinery to adjudicate claims of the nature alleged by you. Such claims must be settled privately or in a court of competent jurisdiction using local law.

In view of the foregoing, your objections to the grant of the applications ARE DENIED. Upon finding that the applicants are qualified and that a grant of the applications will serve the public interest, the Chief, Broadcast Bureau, pursuant to delegated authority, has this date granted the applications for the acquisition of WFDR-AM-FM by Provident Broadcasting Company.

Sincerely yours,

Roy J. Stewart

Roy J. Stewart
Chief, Renewal and Transfer Division
Broadcast Bureau

cc: Eric S. Kravetz, Esq.
Julian Freret, Esq.